Supreme Court, U.S.
FILED
981235 FEB 1 - 1999
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

AND

JOHN HUMENANSKY

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the States was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Reason for granting the petition	5
Conclusion	5
Appendix A	1a
Appendix B	21a
Appendix C	31a
Appendix D	32a

TABLE OF AUTHORITIES

Cases:

Kimel v. *Florida Board of Regents*, cert. granted (Jan. 25, 1999)	5
United States v. *Florida Board of Regents*, cert. granted (Jan. 25, 1999)	5

Constitution and statutes:

U.S. Const.:	
Amend. XI	3, 4, 5, 32a
Amend. XIV (Equal Protection Clause)	4
§ 1	32a
§ 5	3, 32a
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*	2, 33a
29 U.S.C. 623(a)(1)	2
29 U.S.C. 623(j) (Supp. II 1996)	2
29 U.S.C. 626(b)	3, 4
29 U.S.C. 626(c)(1)	3
29 U.S.C. 630(b)	2
29 U.S.C. 630(f)	2
29 U.S.C. 633a (1994 & Supp. II 1996)	2
29 U.S.C. 633a(a) (Supp. II 1996)	2

Statutes—Continued: Page

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 3, 47a
29 U.S.C. 216(b) 3, 4
2 U.S.C. 1311(a)(2) (Supp. III 1997) 2
2 U.S.C. 1311(b)(2) (Supp. III 1997) 2
5 U.S.C. 2302(b)(1)(B) (1994 & Supp. III 1997) 2
5 U.S.C. 3307 2
5 U.S.C. 8335 2
28 U.S.C. 2403(a) 3

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 152 F.3d 822. The opinion of the district court (App., *infra*, 21a-30a) is reported at 958 F. Supp. 439.

JURISDICTION

The court of appeals entered its judgment on August 11, 1998. A petition for rehearing was denied on

November 3, 1998 (App., *infra*, 31a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth at App., *infra*, 32a-48a.

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, renders it unlawful for employers "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA defines "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. 630(b).* The ADEA authorizes individuals aggrieved by an employer's failure to comply with the Act to

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* The ADEA also applies to private employers, 29 U.S.C. 630(b) and (f), and to the federal government, 29 U.S.C. 633a (1994 & Supp. II 1996). The ADEA's application to the States mirrors in large part its application to the federal government. Like the States, the federal government is required to be "free from any discrimination based on age" in "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age." 29 U.S.C. 633a(a) (Supp. II 1996); see also 5 U.S.C. 2302(b)(1)(B) (1994 & Supp. III 1997). Congress has extended the prohibitions and remedies of the ADEA to itself as well. See 2 U.S.C. 1311(a)(2) and (b)(2) (Supp. III 1997). It has exempted a small number of positions, mostly in law enforcement and firefighting, from the ban on maximum hiring ages and mandatory retirement ages, in both federal and state government employment. See, *e.g.*, 5 U.S.C. 3307, 8335 (federal); 29 U.S.C. 623(j) (Supp. II 1996) (state).

"bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1). The ADEA also expressly incorporates some of the enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* See 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 * * *, and 217 of this title."). One of those incorporated provisions, 29 U.S.C. 216(b), authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

2. The plaintiff in this case, John Humenansky, was employed as a Senior Electron Technician by the University of Minnesota from 1969 until his termination in 1994. App., *infra*, 21a. He filed suit in federal district court alleging that respondent Regents of the University of Minnesota laid him off because of his age and in retaliation for filing an age-discrimination complaint. *Id.* at 21a-22a. Respondent moved to dismiss on the ground of Eleventh Amendment immunity. See *id.* at 22a. The district court granted the motion, holding that the ADEA lacks a clear textual statement evidencing Congress's intent to abrogate the States' Eleventh Amendment immunity. *Id.* at 23a-28a. In the alternative, the court found that any abrogation would be invalid because Congress did not intend to exercise its authority under Section 5 of the Fourteenth Amendment when it enacted the ADEA. *Id.* at 28a-30a.

3. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in the ADEA. The court of appeals affirmed. App., *infra*, 1a-20a.

The court held that the ADEA "does not reflect an unmistakably clear intent to abrogate Eleventh Amendment immunity." App., *infra*, 6a. The court of appeals agreed that the enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 216(b), which are incorporated into the ADEA, 29 U.S.C. 626(b), clearly manifest an intent to abrogate. The court concluded, however, that Congress's failure directly to provide such language in the ADEA, rather than simply continuing to incorporate the Fair Labor Standards Act provision, demonstrated either that Congress had "no intent to abrogate for the ADEA," or "legislative oversight," both of which are insufficient to abrogate immunity. App., *infra*, 4a-6a.

The court of appeals also ruled that, even if the ADEA did contain a clear expression of congressional intent to abrogate Eleventh Amendment immunity, Congress did not have the power to effect the abrogation. App., *infra*, 6a-13a. The court reasoned that Congress could not prohibit age discrimination to enforce the Equal Protection Clause because this Court had never found unconstitutional any age-based classification and therefore "there has been no judicial definition of invidious * * * age discrimination." *Id.* at 10a. The court thus concluded that the ADEA was not legislation designed to remedy existing constitutional violations. *Id.* at 13a.

District Court Judge Bataillon, sitting by designation, dissented. App., *infra*, 13a-20a. He would have joined the numerous other courts of appeals that had sustained the ADEA's abrogation of Eleventh Amendment immunity. *Id.* at 13a-15a, 20a.

REASON FOR GRANTING THE PETITION

On January 25, 1999, this Court granted review in *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791. The questions concerning the ADEA's abrogation of Eleventh Amendment immunity raised by this petition are identical to those presented in No. 98-796 and No. 98-791. Accordingly, this petition should be held pending the Court's decision in those consolidated cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791, and disposed of in accordance with the decision in those cases.

Respectfully submitted.

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FEBRUARY 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2302

JOHN HUMENANSKY, PLAINTIFF-APPELLANT

UNITED STATES OF AMERICA, INTERVENOR ON APPEAL

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA,
DEFENDANT-APPELLEE

Submitted March 9, 1998
Decided Aug. 11, 1998

Before: WOLLMAN AND LOKEN, Circuit Judges, and BATAILLON,* District Judge.

LOKEN, Circuit Judge.

The Eleventh Amendment bars federal court jurisdiction over a suit between an unconsenting State and one of its citizens unless Congress has effectively abrogated the State's Eleventh Amendment immunity. *See Edelman v. Jordan*, 415 U.S. 651, 662-63, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974). The University of Minnesota is "an instrumentality of the state" entitled to invoke Minnesota's Eleventh Amendment immunity. *See Treleven v. University of Minnesota*, 73 F.3d 816,

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* The HONORABLE JOSEPH F. BATAILLON, United States District Judge for the District of Nebraska, sitting by designation.

818-19 (8th Cir. 1996). John Humenansky brought this action in federal court, alleging that the University violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, when it laid him off in 1994. The district court[1] dismissed, concluding that the suit is barred by the Eleventh Amendment because Congress neither intended to abrogate Eleventh Amendment immunity nor acted under § 5 of the Fourteenth Amendment in enacting 1974 amendments that extended the ADEA to cover public employers. Humenansky appeals, supported by the United States as intervenor. We affirm.

To determine whether a federal statute abrogates Eleventh Amendment immunity, we ask "first, whether Congress . . . unequivocally expressed its intent to abrogate the immunity, and second, whether Congress . . . acted pursuant to a valid exercise of power." *Seminole Tribe v. Florida*, 517 U.S. 44, 55, 116 S. Ct. 1114, 1123, 134 L.Ed.2d 252 (1996). The practical import of this inquiry is narrow, affecting only whether States may be sued in federal court for ADEA violations. We review these questions of law *de novo*.

A. Congressional Intent To Abrogate. The power to abrogate Eleventh Amendment immunity "implicates the fundamental constitutional balance between the Federal Government and the States." Therefore, "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 243, 105 S. Ct. 3142, 87 L.Ed.2d 171 (1985). The statute need not explicitly reference sover-

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[1] The HONORABLE PAUL A. MAGNUSON, Chief Judge of the United States District Court for the District of Minnesota.

eign immunity or the Eleventh Amendment. *See Dellmuth v. Muth*, 491 U.S. 223, 233, 109 S. Ct. 2397, 105 L.Ed.2d 181 (1989) (Scalia, J., concurring). But its text must contain "unmistakably clear" language that States may be sued in federal court. A general authorization for suit in federal court is not enough. *See Seminole Tribe*, 116 S. Ct. at 1123-24.

The ADEA prohibits age discrimination in employment. The statute has its own recitation of prohibited conduct and covered employers. *See* 29 U.S.C. §§ 623, 630(b). But it contains a hybrid enforcement mechanism: 29 U.S.C. § 626(c) authorizes aggrieved persons to sue "in any court of competent jurisdiction" for relief under the ADEA, while 29 U.S.C. § 626(b) provides that the ADEA "shall be enforced in accordance with the powers, remedies, and procedures provided in" the Fair Labor Standards Act (FLSA). Among the cross-referenced FLSA enforcement statutes is 29 U.S.C. § 216(b), which authorizes aggrieved employees to sue for damages and liquidated damages "in any Federal or State court of competent jurisdiction." *See generally Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125, 105 S. Ct. 613, 83 L.Ed.2d 523 (1985).

Initially, both the FLSA and the ADEA excluded States and their political subdivisions from the statutory definitions of covered employers. In 1966, Congress amended the FLSA definition of employer to include certain state and local employees. The Supreme Court held in *Employees of the Dept. of Public Health & Welfare v. Missouri*, 411 U.S. 279, 285, 93 S. Ct. 1614, 36 L.Ed.2d 251 (1973), that this amendment did not evidence sufficiently clear congressional intent to abrogate Eleventh Amendment immunity because Congress

did not correspondingly amend the enforcement provision, 29 U.S.C. § 216(b):

> [W]e have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts. . . . It would . . . be surprising . . . to infer that Congress deprived Missouri of her constitutional immunity without changing the [provision] under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away.

Congress responded in 1974 by amending § 216(b) to permit actions "against any employer (*including a public agency) in any Federal or State court.* "Pub. L. No. 93-259, § 6, 88 Stat. 61 (emphasis added). The amendment was intended to overturn the Eleventh Amendment ruling in *Employees*. *See* H.R. REP. NO. 93-259, *reprinted in* 1974 U.S.C.C.A.N. 2811, 2853. Though the intent-to-abrogate inquiry focuses on statutory text, not legislative history, we agree with numerous other circuits that the 1974 amendments to § 216(b) reflect an unmistakably clear textual intent to abrogate Eleventh Amendment immunity from FLSA suits in federal court. *See, e.g., Reich v. State of New York*, 3 F.3d 581, 590-91 (2d Cir. 1993); *Hale v. State of Arizona*, 993 F.2d 1387, 1391-92 (9th Cir. 1993); *cf. Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 n. 2, 452, 96 S. Ct. 2666, 49 L.Ed.2d 614 (1976) ("congressional authorization to sue the State . . . clearly present" when Title VII amended to allow suits against "governments [and] governmental agencies").

At the same time Congress amended the FLSA's § 216(b), it expanded the ADEA's definition of "em-

ployer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." Pub. L. No. 93-259, § 28, 88 Stat. 74, codified at 29 U.S.C. § 630(b)(2). Because § 626(b) of the ADEA incorporates § 216(b), the 1974 amendments amended part of the ADEA enforcement mechanism as well as the definition of employer. But left unamended was 29 U.S.C. § 626(c)—it still contains only a general authorization to enforce the ADEA "in any court of competent jurisdiction." Thus, we face a conundrum. If we look only at § 626(c), the 1974 ADEA amendments are just like the 1966 FLSA amendments at issue in *Employees*—Congress now covered public employers but did not expressly allow them to be sued in federal court. On that basis, we would conclude no intent to abrogate, following the reasoning in *Employees* as reinforced by the Court's later decisions in *Atascadero* and *Dellmuth*. On the other hand, if we look at the ADEA's enforcement scheme from the perspective of its cross-reference to the FLSA, Congress cured the abrogation deficiency found in *Employees* by amending § 216(b) at the same time § 630(b)(2) was amended to include States and other public employers.

Quite properly, the United States as intervenor emphasizes the 1974 amendment to § 216(b) in arguing clear intent to abrogate, while the University counters by emphasizing the lack of an amendment to § 626(c). Both are weighty arguments pointing in diametrically opposite directions. Congress in 1974 focused on the *Employees* decision, intended to legislatively overrule it as to the FLSA, and amended the ADEA to cover States and their political subdivisions. If Congress intended to abrogate Eleventh Amendment immunity

for the ADEA as well as the FLSA, and recognized that *Employees* required that intent to abrogate be reflected by amending the enforcement provisions, why not amend § 626(c), the ADEA provision that most directly addresses the question of federal court jurisdiction? There are only two rational answers to that question—no intent to abrogate for the ADEA, or legislative oversight, which is not a proper basis for finding "unmistakably clear" intent to abrogate in the statute's text. *See Dellmuth*, 491 U.S. at 232, 109 S. Ct. 2397 ("permissible inference" of an intent to abrogate is not enough). Thus, we conclude the district court correctly held that the ADEA's text does not reflect an unmistakably clear intent to abrogate Eleventh Amendment immunity. We disagree with other circuits that have found an intent to abrogate without analyzing this aspect of the 1974 amendments.[2]

B. Congressional power to abrogate. Even if the ADEA's text contained a sufficiently clear expression of intent to abrogate, we conclude that Congress lacked the power to abrogate Eleventh Amendment immunity. The Commerce Clause, part of Article I of the

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[2] *See Keeton v. University of Nevada System*, 150 F.3d 1055, 1057-58 (9th Cir. 1998); *Goshtasby v. Board of Trustees*, 141 F.3d 761, 765-66 (7th Cir. 1998); *Hurd* v. *Pittsburg State Univ.*, 109 F.3d 1540, 1544 (10th Cir. 1997); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. 1996) (dictum); *Santiago v. New York State Dep't of Correctional Servs.*, 945 F.2d 25, 31 (2nd Cir. 1991) (dictum), *cert. denied*, 502 U.S. 1094, 112 S. Ct. 1168, 117 L.Ed.2d 414 (1992); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 701 (1st Cir. 1983); *but see Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998) (divided panel holds Eleventh Amendment immunity not abrogated, one judge concluding there was no clear intent to abrogate, and one judge concluding there was no power to abrogate).

Constitution, cannot be used to abrogate the Eleventh Amendment's limitation on the Article III jurisdiction of the federal courts. *See Seminole Tribe*, 116 S. Ct. at 1131-32, overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L.Ed.2d 1 (1989). However, § 5 of the Fourteenth Amendment is a valid basis for abrogating Eleventh Amendment immunity because that Amendment was intended to "fundamentally alter[ ] the balance of state and federal power struck by the Constitution." *Id.* at 59, 116 S. Ct. at 1125, citing *Fitzpatrick*, 427 U.S. at 452-56, 96 S. Ct. 2666. Section 5 "is a positive grant of legislative power" to enforce § 1 of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, ——, 117 S. Ct. 2157, 2163, 138 L.Ed.2d 624 (1997), quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S. Ct. 1717, 16 L.Ed.2d 828 (1966). Those sections provide in relevant part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> * * * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The ADEA has been upheld as a valid exercise of Congress' power under the Commerce Clause. *See E.E.O.C. v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 75 L.Ed.2d 18 (1983). The power-to-abrogate question turns on whether the ADEA is also a valid exercise of

Congress' powers under § 5. "Because such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Gregory v. Ashcroft*, 501 U.S. 452, 469, 111 S. Ct. 2395, 115 L.Ed.2d 410 (1991) (quotation omitted). Though Congress need not expressly articulate an intent to legislate under § 5, a court must "be able to discern some legislative purpose or factual predicate that supports the exercise of that power." *Wyoming*, 460 U.S. at 243 n. 18, 103 S. Ct. 1054. The issue has been more clearly framed by the Supreme Court's recent decision in *City of Boerne*, in which the Court invalidated the Religious Freedom Restoration Act of 1993 as exceeding Congress' authority under § 5.

Humenansky and the United States argue that the ADEA is a valid exercise of Congress' § 5 power. The Fourteenth Amendment's Equal Protection Clause protects against invidious governmental discrimination on grounds other than race. The ADEA prohibits invidious discrimination against government employees on account of their age. Therefore, they argue, ADEA is "plainly adapted" to enforcing the Equal Protection Clause. *Katzenbach v. Morgan*, 384 U.S. at 651, 86 S. Ct. 1717. They further argue that, in enforcing the Fourteenth Amendment, Congress is not limited to prohibiting what the courts have declared unconstitutional under the Equal Protection Clause. Indeed, Congress can legislate a stricter standard of conduct than that required by the Equal Protection Clause when legislating pursuant to § 5. The only limit on Congress' § 5 power to enforce the Equal Protection

Clause with "appropriate legislation" is that the federal statute must be "consistent with the letter and spirit of the constitution." *Id.* at 656, 86 S. Ct. 1717. A number of circuit decisions have accepted this argument, but the three circuits to consider the issue since *City of Boerne* have reached conflicting conclusions.[3]

If this argument is correct, Congress' § 5 power to enforce the Equal Protection Clause is virtually unlimited, because it is not tied to enforcing judicially recognized equal protection violations. Age is not a suspect class entitled to a heightened level of equal protection scrutiny. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562, 49 L.Ed.2d 520 (1976). In *Murgia*, the Court upheld a mandatory retirement age for Massachusetts state police officers, concluding the statute "clearly [met] the requirements of the Equal Protection Clause" because it rationally furthered the reasonable state objective of ensuring a physically fit police force. 427 U.S. at 314-15, 96 S. Ct. 2562. In *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939, 59 L.Ed.2d 171 (1979), the Court upheld a federal statute mandating that Foreign Service officers retire at age sixty against an equal protection challenge, concluding the classification was valid under rational basis review. The Equal Protection Clause applies not only to statutes such as those at issue in *Murgia* and *Vance*, but also to the day-to-day employment decisions of a myriad of state officers and agencies. But these

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[3] *Compare Kimel*, 139 F.3d at 1445-48 (Cox, J., concurring), *with Goshtasby*, 141 F.3d at 769-72, and *Keeton*, 150 F.3d at 1057-58. *See also Hurd*, 109 F.3d at 1544-46, *aff'g* 821 F. Supp. 1410, 1412 (D. Kan. 1993); *Blanciak*, 77 F.3d at 695; *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 698-700 (1st Cir. 1983); *Arritt v. Grisell*, 567 F.2d 1267, 1270-71 (4th Cir. 1977).

isolated executive actions are unconstitutional only if they are the product of intentional discrimination that "fail[s] to comport with the requirements of equal protection." *Batra v. Board of Regents*, 79 F.3d 717, 721 (8th Cir. 1996). Thus, there has been no judicial definition of invidious, that is, unconstitutional age discrimination, and given the many economic and social factors that may justify adverse employment action based upon age in a particular situation,[4] it seems likely that only a few isolated, egregiously irrational instances of age discrimination would violate the Equal Protection Clause. However, under this broad interpretation of § 5, Congress defines what is prohibited, and so long as it is legislating to protect a class of government employees against what Congress defines as "invidious discrimination," it is acting "consistent with the letter and spirit" of the Equal Protection Clause.

Not surprisingly, there are persuasive indications that the Supreme Court would not embrace this expansive view of Congress' § 5 power to enforce the Equal Protection Clause. When the Court upheld the ADEA as valid under the Commerce Clause in *Wyoming*, the narrow majority expressly declined to decide

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[4] Depending upon the situation, adverse employment action may be justified to save money by eliminating a higher paid worker who is not more productive, to meet the physical demands of a job, to adapt more quickly to rapidly changing technology, to promote healthy turnover of a work force, to satisfy customer demands for a younger work force, and so forth. These are rationales that Congress can reject using its legislative powers under the Commerce Clause, but they are sufficiently valid in most circumstances to withstand Equal Protection Clause review. In sum, the ADEA does not primarily target equal protection violations, nor are its prohibitions tailored to meeting equal protection concerns.

this § 5 issue. *See* 460 U.S. at 243 & n. 18, 103 S. Ct. 1054. But the four dissenters reached the issue and concluded the ADEA exceeds Congress' § 5 power. After explaining that the Wyoming statute in question, like the mandatory retirement programs at issue in *Murgia* and *Vance*, was not invalid under the Fourteenth Amendment, the dissenters concluded:

> [T]he Age Act can be sustained only if we assume first, that Congress can define rights wholly independent of our case law, and second, that Congress has done so here. I agree with neither proposition.
>
> Allowing Congress to protect constitutional rights statutorily that it has independently defined fundamentally alters our scheme of government. . . . There is no hint in the body of the Constitution ratified in 1789 or in the relevant Amendments that every classification based on age is outlawed. Yet there is much in the Constitution and the relevant Amendments to indicate that states retain sovereign powers not expressly surrendered, and these surely include the power to choose the employees they feel are best able to serve and protect their citizens.
>
> And even were we to assume, *arguendo*, that Congress could redefine the Fourteenth Amendment, I would still reject the power of Congress to impose the Age Act on the states when Congress, in the same year that the Age Act was extended to the states, passed mandatory retirement legislation of its own for law enforcement officers and firefighters.

460 U.S. at 262-63, 103 S. Ct. 1054 (Burger, C.J., dissenting). Similarly, Justice Stewart, concurring in part for himself, Chief Justice Burger, and Justice Blackmun

in *Oregon v. Mitchell*, 400 U.S. 112, 296, 91 S. Ct. 260, 27 L.Ed.2d 272 (1970), explained that § 5 gives Congress "the means of eradicating situations that amount to a violation of the Equal Protection Clause," but not the power "to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause."

Chief Justice Burger's dissent in *Wyoming* reads like a preview of the Court's opinion in *City of Boerne*. There, the Court first explained that Congress' § 5 powers, while broad, are not without limits:

> Congress' power under § 5, however, extends only to "enforcing" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

521 U.S. at ——, 117 S. Ct. at 2164 (citation omitted). "If Congress could define its own powers by altering the Fourteenth Amendment's meaning," the Court continued, "no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" *Id.* at ——, 117 S. Ct. at 2168, quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803), and declining to expansively construe *Katzenbach v. Morgan*. The Court went on to conclude that RFRA

exceeded Congress' § 5 power because it "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," and because that statute "is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion." *Id.* at —— - ——, 117 S. Ct. at 2170-71. We conclude the ADEA likewise exceeds Congress's § 5 powers as defined in *City of Boerne*, for the reasons set forth in Chief Justice Burger's dissenting opinion in *Wyoming*. *Accord Kimel*, 139 F.3d at 1446-48 (Cox, J., concurring); *MacPherson v. University of Montevallo*, 938 F. Supp. 785, 789 (N.D.Ala.1996).[5]

The judgment of the district court is affirmed.

BATAILLON, District Judge, dissenting:

I respectfully dissent from the court's decision concluding that the text of the Age Discrimination in Employment Act ("ADEA") does not reflect an unmistakably clear intent by Congress to abrogate the states' Eleventh Amendment immunity. I also must dissent from the court's decision that the ADEA exceeds Congress' § 5 enforcement power under the Fourteenth Amendment.

Prior to the appeal in this case, five sister circuits have concluded that Congress had the intent to abrogate the states' Eleventh Amendment immunity from claims filed under the Age Discrimination in

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[5] In dissenting on this issue, Judge Bataillon relies in part on the panel opinion in *Autio v. AFSCME, Local 3139*, 140 F.3d 802 (8th Cir. 1998). That opinion was vacated when we granted the petition for rehearing en banc on July 7, 1998.

Employment Act. *Hurd v. Pittsburg State University*, 109 F.3d 1540, 1544 (10th Cir. 1997) (declaring "Congress intended to abrogate state sovereign immunity by enacting the 1974 amendments to the ADEA."); *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3d Cir. 1996) (declaring "The [ADEA] simply leaves no room to dispute whether states and state agencies are included among the class of potential defendants when sued under the ADEA for their actions as 'employers.'"); *Santiago v. New York State Dep't of Correctional Servs.*, 945 F.2d 25, 31 (2d Cir.1991) (declaring in dictum that the ADEA is an example of "legislation that has clearly stated Congress' intention to abrogate states' immunity from damage actions in a variety of contexts."); *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990) (concluding "Unless Congress had said in so many words that it was abrogating the states' sovereign immunity in age discrimination cases—and that degree of explicitness is not required . . .—it could not have made its desire to override the states' sovereign immunity clearer."); and *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 701 (1st Cir. 1983) (concluding "[T]he ADEA's express authorization for the maintenance of suits against state employers comprises adequate evidence to demonstrate the congressional will that Eleventh Amendment immunity be abrogated.").

Since this case was argued, the Seventh Circuit has reaffirmed its earlier decision in *Davidson*, and the Ninth Circuit has joined the overwhelming majority of circuits in holding that Congress clearly expressed its intention to abrogate states' immunity in private suits for violations of the ADEA. *Goshtasby v. Board of Trustees.*, 141 F.3d 761, 766 (7th Cir. 1998) (holding

"[W]e reaffirm our position that Congress made its intention to abrogate the states' sovereign immunity unmistakably clear in the ADEA's 1974 amendment."); and *Keeton et al. v. University of Nevada Sys.*, 150 F.3d 1055, 1058 (9th Cir. 1998) (holding that "Congress abrogated the states' immunity in amending the ADEA pursuant to its Fourteenth Amendment enforcement authority."). The weight of reason set forth in these seven circuit court opinions compels me to dissent from the majority's decision.

To determine whether Congress abrogated the states' Eleventh Amendment immunity in enacting the ADEA, a Court must first decide whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity." *Seminole Tribe v. Florida*, 517 U.S. 44, 55, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996). However, Congress' intent in the statutory text does not require explicit reference to state sovereign immunity or to the Eleventh Amendment. *Dellmuth v. Muth*, 491 U.S. 223, 233, 109 S. Ct. 2397, 105 L.Ed.2d 181 (1989). Direct reference to the "state" in the text of a federal statute may suffice to evidence Congress' intent to abrogate the states' sovereign immunity from suit. *Seminole Tribe*, 517 U.S. at 57, 116 S. Ct. 1114 (concluding that "the numerous references to the 'State' in the text of [the statute] make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit.").

When Congress enacted the ADEA in 1967, the Act applied only to private employers. *EEOC v. Elrod.*, 674 F.2d 601, 605-06 (7th Cir. 1982). In 1974, Congress expanded the ADEA's definition of "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State." Pub. L. No.

93-259, § 28(a)(2), 88 Stat. 74, codified at 29 U.S.C. § 630(b)(2). Congress also amended the definition of "employee" to include employees subject to the civil service laws of a State government. *Id.*, § 28(a)(4), 88 Stat. 74, codified at 29 U.S.C. § 630(f). The direct textual references to "state"—state, political subdivision of a state, agency of a state, instrumentality of a state, and state government—in the 1974 amendment to the ADEA clearly expressed Congress' intent to abrogate states' sovereign immunity. *Cf. Seminole Tribe*, 517 U.S. at 57, 116 S. Ct. 1114.

Under the *Seminole Tribe* test the second inquiry is whether Congress has acted "pursuant to a valid exercise of power" under the Fourteenth Amendment. *Id.* at 55, 116 S. Ct. 1114. The Supreme Court has declared that "§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S. Ct. 1717, 16 L.Ed.2d 828 (1966). Although the 1974 amendment does not explicitly refer to the Fourteenth Amendment, there is no requirement that it do so. *EEOC v. Wyoming*, 460 U.S. at 243 n. 18, 103 S. Ct. 1054 (declaring congress need not "anywhere recite the words 'section 5' of the 'Fourteenth Amendment' or 'equal protection' . . . 'for the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise'") (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S. Ct. 421, 92 L.Ed. 596 (1948)).

To determine whether Congress enacted appropriate legislation under § 5 of the Fourteenth Amendment, the Supreme Court established a three-part test in *Katzen-*

bach v. Morgan. First, a court must determine whether a statute may be regarded as an enactment to enforce the Equal Protection Clause. Second, a court must determine whether the statute is plainly adapted to enforce the Equal Protection Clause. Third, a court must determine whether the statute is consistent, and not prohibited by, the letter and spirit of the Constitution. 384 U.S. at 650-51, 86 S. Ct. 1717. Recently, the Supreme Court supplemented the analysis by directing courts to examine whether the statute creates new constitutional rights through legislation or only deters and remedies constitutional violations. *City of Boerne v. Flores*, 521 U.S. 507, ——, 117 S. Ct. 2157, 2163, 138 L.Ed.2d 624 (1997). A statute is deemed appropriate legislation if it deters or remedies constitutional violations. *Id.*

The ADEA was enacted to enforce the Equal Protection Clause. In enacting the ADEA, Congress announced "[T]he purpose of this [Act is] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621. In 1973, a Senate committee report found "[t]here is evidence that, like the corporate world, government managers also create an environment where young is sometimes better than old." *EEOC v. Wyoming*, 460 U.S. at 233, 103 S. Ct. 1054 (*quoting* Senate Special Committee on Aging, Improving the Age Discrimination Law, 93d Cong., 1st Sess., 14 (Comm. Print. 1973), Legislative History 215, 231). In 1974, Congress responded by amending the ADEA to provide federal, state, and local government workers with the same protections against age-based

discrimination afforded to employees in the private sector. 29 U.S.C. §§ 630(b) and 631(b); *EEOC v. Wyoming*, 460 U.S. at 233 n. 5, 103 S. Ct. 1054.

Today, the majority concludes that the ADEA is not plainly adapted because it prohibits more than what an Article III court may find unconstitutional under the Fourteenth Amendment.[6] In reaching this conclusion, the majority relies, in part, on *City of Boerne*. The majority's reliance on *City of Boerne* is dubious. The federal statute challenged as unconstitutional was the Religious Freedom Restoration Act ("RFRA"), 107 Stat. 1488. 42 U.S.C. § 2000bb et seq. The Court found that the RFRA was an unconstitutional exercise of Congress' § 5 power because the statute was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at ——, 117 S. Ct. at 2170. As such, the Court found that Congress exceeded its § 5 power in enacting the RFRA because the statute attempted a "substantive change in constitutional protections." *Id.*

Recently, an Eighth Circuit panel considered whether Congress had properly enacted the Americans with Disabilities Act ("ADA") under § 5 of the Fourteenth Amendment. *Autio v. AFSCME*, Local 3139, 140 F.3d 802, 805-06 (8th Cir. 1998). In determining that

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[6] Recently, the United States Court of Appeals for the Eleventh Circuit held that the ADEA was not a proper exercise of Congress' section 5 power because the ADEA confers more extensive rights than those provided by the Fourteenth Amendment. *Kimel v. State of Fla. Bd. Of Regents.*, 139 F.3d 1426, 1446-47 (11th Cir. 1998).

Congress had, the panel distinguished the RFRA from the ADA by declaring:

> Unlike the RFRA, the ADA clearly chronicles and directly addresses the discrimination people with disabilities have experienced and the 'evils' those with disabilities continue to experience in modern day America. . . . Unlike the RFRA struck down in *Flores*, the ADA is 'plainly adapted' as a remedial measure even though each individual violation of the ADA may not in and of itself be unconstitutional. The remedies provided in the ADA are not so sweeping that they exceed the harms they are sought to redress. Because of the clear "evil" present in disability discrimination and the well-documented need for equal protection in this respect, the ADA is plainly adapted to the end of providing those with disabilities equal protection under the law.

Id. at 805.

The analysis in *Autio* is directly applicable to this case. In the text of the ADEA statute, Congress directly addressed the arbitrary discrimination older employees face in the workplace. *See* 29 U.S.C. § 621(b). The remedies provided in the ADEA are not "so out of proportion" to the problems of arbitrary age discrimination identified by Congress. Rather, the documented existence of age-based discrimination in private and public employment induced Congress to intrude not only upon the interests of private employers but also upon state interests through the enactment of the 1974 amendments. In light of the well-documented need for equal protection of older workers, I believe the ADEA is plainly adapted to the

end of providing older workers equal protection under the law.

Finally, the 1974 amendments to the ADEA are fully consistent with both the letter and the spirit of the Constitution. The Constitution guarantees equal protection under the law. Arbitrary and intentional discrimination on the basis of age violates the Equal Protection Clause. *Gregory v. Ashcroft*, 501 U.S. at 470-71, 111 S. Ct. 2395. Simply because the Supreme Court does not elevate age to a suspect or quasi-suspect classification does not mean that Congress cannot enforce the Equal Protection Clause through the enactment of a statute aimed directly at prohibiting arbitrary age discrimination in employment. *Goshtasby v. Board of Trustees of University of Illinois*, 141 F.3d 761, 771 (7th Cir. 1998). I concur with the Seventh Circuit in concluding that Congress does not exceed its enforcement power under § 5 by enacting legislation designed to guarantee equal protection for all persons regardless of the level of judicial scrutiny afforded to them. *Id.*

For the foregoing reasons, I respectfully dissent and would reverse the order of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil File No. 4-96-729

JOHN HUMENANSKY, PLAINTIFF

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MINNESOTA, DEFENDANT

[Filed: Apr. 7, 1997]

MEMORANDUM AND ORDER

This matter is before the Court upon Defendant's Motion for Summary Judgment. For the following reasons, Defendant's Motion is granted.

I. BACKGROUND

Plaintiff Humenansky began his employment with the University of Minnesota ("University") as a Senior Electron Technician in October 1969. Humenansky was laid off by the University on May 20, 1994. Humenansky then brought this suit alleging employment discrimination and retaliation in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.

§ 621 *et. seq.* Defendant has now moved for summary judgment with respect to all of Humenansky's claims.

II. STANDARD OF REVIEW

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir. 1992). The court determines materiality from the substantive law governing the claim. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over facts that might affect the outcome of the lawsuit according to applicable substantive law are material. *See Id.* A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. *See Id.* at 248-49.

III. DISCUSSION

Defendant makes two arguments in support of its motion for summary judgment. Defendant argues that Humenansky's claims are barred by the Eleventh Amendment. Second, Defendant argues that even if permissible, Humenansky fails to survive summary judgment because he cannot establish a prima facie case of discrimination or retaliation under the ADEA. The Court has previously ruled that material issues of fact exist with regard to the substance of Humenansky's claims. However, because the Court believes that the Eleventh Amendment bars Humenansky's claims, the Court dismisses his complaint.

The Eleventh Amendment provides that:

> the Judicial power of the United States shall not be construed to extend to any suit in law or equity,

> commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Supreme Court has held that the Eleventh Amendment prevents suits against governments as well as entities that effectively constitute the government unless those entities have given their consent to be suit. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). Within the context of Eleventh Amendment immunity, the University of Minnesota is considered an "arm" of the state government. *See Treleven v. University of Minnesota*, 73 F.3d 816, 819 (8th Cir. 1996).

In support of its motion, Defendant has cited two cases in which courts have found that the ADEA does not effectively waive the States' Eleventh Amendment immunity. *See MacPherson v. University of Montevallo*, 938 F. Supp. 785, 789 (N.D. Ala. 1996); *Coger v. Board of Regents of Univ.*, No. 89-2374-GA (W.D. Tenn. Jan. 2, 1997) (unpublished). The Court agrees with the result reached in these cases.

In *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 114 (1996), the Supreme Court outlined the inquiry for determining whether immunity has been waived:

> In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity," . . . and second, whether Congress has acted "pursuant to a valid exercise of power."

Id. at 1123 (*citing Green v. Monsour*, 106 S. Ct. 423, 426 (1985)). With regard to the first inquiry, whether Congress has indicated its intent to abrogate the States'

immunity, the Supreme Court has discussed the level of specificity required. In *Atascadero State Hospital v. Scanlon*, 105 S. Ct. 3142, 3147 (1985), the Court emphasized the importance of Eleventh Amendment immunity and the caution with which issues of abrogation of that immunity should be approached. The court stated that its "reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 104 S. Ct. 900, 907 (1984)). In light of the seriousness afforded Eleventh Amendment immunity, the Court held that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Id.* at 3148.

In *Atascadero*, the Court addressed immunity in the context of the Rehabilitation Act of 1973 ("Act"). The relevant portions of the Act provided that remedies "shall be available to any person aggrieved by an act or failure to act by any recipient of Federal assistance." Despite the fact that California was a recognized recipient of federal assistance, the Court found that more specificity was required to implicate the Eleventh Amendment. *Id.*

> A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.

Id. at 3149 (citations omitted).

This result was re-affirmed by the Court in *Dellmuth v. Muth*, 109 S. Ct. 2397 (1989). In *Dellmuth*, the Court

determined that the Education of the Handicapped Act did not abrogate the States' Eleventh Amendment immunity. The Court discussed the three portions of the Act that were relevant to the immunity issue. The Act's preamble stated that "it is in the national interest that the Federal government assist State and local efforts to provide programs to meet the education needs of handicapped children in order to assure equal protection of the law." *Id.* at 2400 (quoting 20 U.S.C. § 1400(b)(9)). The Act also permitted aggrieved parties to "bring a civil action . . . in any State court of competent jurisdiction in a district court of the United States without regard to the amount in controversy." *Id.* (quoting 20 U.S.C. § 1415(e)(2)). The Act was amended in 1986 to state that provisions that would reduce attorney's fees would not apply "if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section." *Id.* (quoting 20 U.S.C. 1415(e)(4)(G) (1982 ed., Supp. V)).

The Court found that these provisions did not "demonstrate with unmistakable clarity that congress intended to abrogate the States' immunity from suit." *See Id.* at 2402. Without reference to the Eleventh Amendment or sovereign immunity, the Court was unable to find the requisite clear intention. *Id.* As the Court stated:

> We recognize that the EHA's frequent reference to the States, and its delineation of the States' important role in securing an appropriate education for handicapped children, make the States, along with local agencies, logical defendants in suits alleging violations of the EHA. This statutory structure lends force to the inference that the States were

> intended to be subject to damages actions for violations of the EHA. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not [sic] the unequivocal declaration which, we reaffirm today, is necessary before we will determine that Congress intended to exercise its powers of abrogation

Id.

Humenansky argues that the 1974 amendments to the ADEA indicate Congress's intent to abrogate the States' sovereign immunity. These amendments expanded the definition of an "employer" under the ADEA to include "a State or political subdivision of a State or any instrumentality of a State." 29 U.S.C. § 630(b)(2). Humenansky argues that this change clearly contemplated that States and localities would lose their immunity from suit. In addition, Humenansky argues that the amendment is analogous to the 1972 amendments to Title VII which abrogated States' immunity under the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 96 S. Ct. 2666 (1976).

In support of his contention, Humenansky cites *Hurd v. Pittsburg State University*, 821 F. Supp. 1410, 1413 (D. Kan. 1993), *aff'd*, 29 F.3d 564 (10th Cir. 1994). The *Hurd* court held that:

> Congress has made its intention to abrogate the states' Eleventh Amendment immunity crystal clear by providing that states which violate the ADEA are liable for legal and equitable relief. . . . This court believes that the ADEA's express authorization for the maintenance of suits against state employers adequately demonstrates congressional

> intent that the states' Eleventh Amendment immunity be abrogated in suits under the ADEA.

Id. (citation omitted). This same result was reached by the Seventh Circuit in *Davidson v. Board of Gov. of State Colleges & Univ.*, 920 F.2d 441, 443 (7th Cir. 1991). In *Davidson*, the Circuit held that Congress had made its intentions clear:

> Unless Congress had said in so many words that it was abrogating the states' sovereign immunity in age discrimination cases—and that degree of explicitness is not required . . .—it could not have made its desire to override the states' sovereign immunity clearer.

Id. (citing *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2286 (1989) and *Dellmuth*, 109 S. Ct. at 2402 (dictum).

Other decisions cited by *Humenansky* reach results similar to *Hurd* and *Davidson*. *See Ramierez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 701 (1st Cir. 1983); *EEOC v. Elrod*, 674 F.2d 601, 605 (7th Cir. 1982). However, these cases were decided before the Supreme Court's strict tests for abrogating Eleventh Amendment immunity were enunciated in *Atascadero* and *Dellmuth*. While the Court believes that the reasoning of *Hurd* and *Davidson* courts has considerable force, the Court cannot find a principled distinction between the language used in the ADEA amendments and that held ineffective to abrogate States' immunity in *Dellmuth*. It is certainly a reasonable inference that Congress intended to abrogate that immunity by its inclusion of states in its definition of employers. However, there is no discussion of the Eleventh Amendment or sovereign immunity. As the Supreme Court indicated, inferences

are insufficient to support a finding that abrogation was intended. *See Dellmuth*, 109 S. Ct. at 2402. The ADEA lacks the "unequivocal declaration" deemed necessary.

Even if Congress has expressed its unequivocal desire to abrogate the States' Eleventh Amendment immunity, the Court is skeptical whether Congress intended to enact the ADEA pursuant to the Fourteenth Amendment. In *Seminole*, the Supreme Court held that the Commerce Clause was not valid authority for abrogating Eleventh Amendment immunity. 116 S. Ct. at 1124. The Court held that the Fourteenth Amendment was the only constitutional provision which gave authority to Congress to legislate over the States' immunity. *Id.*

In the present case, the authority for Congress's action is at best unclear. Humenansky argues that the Court should view the amendments to the ADEA in light of the 1972 amendments to Title VII, which, according to *Fitzpatrick v. Bitzer*, 96 S. Ct. 2666 (1976), where enacted pursuant to the Fourteenth Amendment. The Court finds the analogy to Title VII unpersuasive. The 1972 amendments to Title VII were adopted explicitly under the authority of the Fourteenth Amendment. Like the *Croger* court, this Court finds it telling that the 1974 ADEA amendments failed to mention the Fourteenth Amendment. Rather, the ADEA amendments were enacted as part of the Federal Labor Standards Act ("FLSA") which was passed pursuant to the Commerce Clause. It is much more plausible that Congress was acting jointly with the passage of the FLSA and ADEA amendments under the Commerce Clause than including the ADEA amendments under the same framework as the Title

VII amendments passed two years prior. As the court in *MacPherson v. University of Montevallo* stated:

> [T]his court fundamentally disagrees with the notion that it slipped the collective minds of Congress to mention the Fourteenth Amendment in the 1974 amendments to the ADEA, but remember it in the 1972 amendments to Title VII.

938 F. Supp. at 786 n.6. The Court finds additional support for its finding in the reasoning of the dissent in *EEOC v. Wyoming*, 103 S. Ct. 1054, 1072-73 (1983). In that case, the dissent (Burger, C.J., Powell, and Rehnquist, JJ.) stated that Congress did not and could not have passed the ADEA pursuant to the Fourteenth Amendment. *Id.*

Other courts have split over the issue of whether the ADEA was enacted under the Fourteenth Amendment or the Commerce Clause. Several courts have held that the ADEA was passed pursuant to the Commerce Clause, *see MacPherson v. Univ. of Montevallo*, 938 F. Supp. 785, 788-789 (N.D. Ala. 1996); *Black v. Goodman*, 736 F. Supp. 1042 (D. Mont. 1990); *Farkas v. New York State Dept. of Heath*, 554 F. Supp. 24 (N.D.N.Y. 1982), *cert. denied*, 474 U.S. 1033 (1985), while other courts, including some circuits, have held that Congress acted pursuant to the Fourteenth Amendment, *see Heiar v. Crawford County*, 746 F.2d 1190, 1194 (7th Cir. 1984); *Ramierez*, 715 F.2d at 700-01; *Hurd*, 821 F. Supp. at 1413. This Court shares the view of the *Croger* [sic] and finds that Congress did not act pursuant to the Fourteenth Amendment in enacting the ADEA. As such, Plaintiff's complaint is dismissed.

Accordingly, IT IS HEREBY ORDERED THAT:

1. Defendant's Motion for Summary Judgment (Clerk Doc. No. 17) is GRANTED;

2. Plaintiff's Complaint (Clerk Doc. No. 1) is DISMISSED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 5, 1997

/s/ PAUL A. MAGNUSON
PAUL A. MAGNUSON
United States District Court
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2302MNMI

JOHN HUMENANSKY, APPELLANT

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA, SUED AS "BOARD OF REGENTS OF THE UNIVERSITY OF MINNESOTA," APPELLEE

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The suggestions for rehearing en banc are denied. Judge McMillian, Judge Richard S. Arnold, and Judge Fagg would grant the suggestion.

The petitions for rehearing by the panel are also denied.

Judge Murphy took no part in the consideration or decision of this case.

November 3, 1998

Order Entered at the Direction of the Court:
/S/ MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

CONSTITUTION OF THE UNITED STATES

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, provides in part:

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

* * * * *

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer–

(1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * * * *

(d) Opposition to unlawful practice; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

* * * * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization–

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section–

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan–

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section

1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

* * * * *

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such an action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of

1996[ ] if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

* * * * *

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed–

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

* * * * *

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

* * * * *

(f) The term "employee" means an individual employed by an employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such

officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

* * * * *

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of em-

ployees assigned to guard individuals incarcerated in any penal institution.

(*l*) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefit, including such benefits provided pursuant to a bona fide employee benefit plan.

* * * * *

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of

such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

* * * * *

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Con-

gress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thrity days' notice of an intent to file such action. Such notice shall be filed within one

hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

* * * * *

The Fair Labor Standards Act of 1938, 29 U.S.C. 216(b), provides in part:

§ 216. Penalties

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right to any employee to become a party plaintiff to any such action, shall terminate upon

the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable thereof under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

Supreme Court, U.S.
FILED
FEB 22 1999
CLERK

No. 98-1235

In the
Supreme Court of the United States
October Term 1998

UNITED STATES OF AMERICA,

Petitioner,

AND

JOHN HUMENANSKY,

VS.

REGENTS OF THE UNIVERSITY OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE BRIEF SUPPORTING PETITION

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the States was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

In the Supreme Court of the United States

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RESPONSE BRIEF SUPPORTING PETITION

John Humenansky, respectfully provides this Response Brief in support of The Solicitor General, on behalf of the United States of America's petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Petitioner's App. *infra*, 1a-20a) is reported at 152 F.3d 822. The opinion of the district court (Petitioner's App., *infra* 21a-30a) is reported at 958 F.Supp.439.

JURISDICTION

The court of appeals entered its judgment on August 11, 1998. A petition for rehearing was denied on November 3, 1998 (Petitioner's App., infra, 31a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth at Petitioner's App., *infra*, 32a-48a.

STATEMENT OF THE CASE

The plaintiff in this case, John Humenansky, was employed by the University of Minnesota ("University") from 1969 until he was laid off on May 20, 1994. Petitioner's App., *infra*, 21a. He then filed suit in federal court alleging employment discrimination and retaliation in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § *et. seq.* Id. at 21a-22a. The University moved for summary judgment on the grounds that Humenansky's claims were barred by Eleventh Amendment immunity and that he could not establish a prima facie case of discrimination or retaliation under the ADEA. The trial Court ruled that material issues of fact exist with regard to the discrimination and retaliation claims, but the Eleventh Amendment barred these claims. Id. at 22a.

> The Eleventh Amendment provides that:
>
> the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. U.S. Const. Amend. XI.

The Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, renders it unlawful for employers "to fail or refuse to hire or to discharge an individual or otherwise discriminate against any individual with respect to the compensation, terms, or conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA defines "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or political subdivision of a State." 29 U.S.C. 630(b). The ADEA authorizes individuals

aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1).

The ADEA also expressly incorporates some of the enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* See 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 ***, and 217 of this title.") One of the incorporating provisions, 29 U.S.C. 216(b), authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

On appeal from the district court's decision, the U.S. intervened pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in the ADEA. In a divided panel, the court of appeals affirmed. Petitioners App., *infra*, 1a-20a.

The court of appeals concluded that the district court correctly held that the ADEA's text does not reflect an unmistakably clear intent to abrogate Eleventh Amendment immunity. Petitioner's App., infra, 2a-6a. The court of appeals agreed that the enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 216(b), which are incorporated into the ADEA, 29 U.S.C. 626(b), clearly manifest an intent to abrogate. The court concluded, however, that Congress's failure directly to provide such language in the ADEA, rather than simply continuing to incorporate the Fair Labor Standards Act provision, demonstrated either that Congress had "no intent to abrogate for the ADEA," or was "legislative oversight," both of which are insufficient to abrogate immunity. Petitioner's App., *infra*, 4a-6a.

The court of appeals also concluded that, even if the

ADEA did contain a sufficiently clear expression of congressional intent to abrogate Eleventh Amendment immunity, Congress lacked the power to abrogate the immunity. Petitioner's App., *infra*, 6a. The court ruled that the ADEA exceeded Congress's § 5 powers as defined in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), for the reasons set forth in Chief Justice Burger's dissenting opinion in *EEOC v. Wyoming*, which included:

> Congress' power under § 5, however, extends only to "enforcing" The provisions of the Fourteenth Amendment. The Court has described this power as "remedial."…. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

521 U.S. at ____, 117 S.Ct. at 2164 (citation omitted).

The court of appeals ruled that Congress could not prohibit age discrimination to enforce the Equal Protection Clause because this Court has never found unconstitutional any age-based classification and therefore "there has been no judicial definition of invidious ***age discrimination." Petitioner's App., *infra*, 10a. The court thus concluded that the ADEA was not legislation designed to remedy existing constitutional violations. *Id.* at 13a.

District Court Judge Bataillon, sitting by designation, dissented. Petitioner's App. *infra*, 13a-20a. Judge Bataillon reasoned (as has numerous other circuits) "the direct textual references to "state" – state, political subdivision of a state, agency of a state, instrumentality of a state, and state government – in the 1974 amendment to the ADEA clearly expressed Congress' intent to abrogate states sovereign immunity." *Id.* at 16a. The 1974 amendments to the ADEA are fully consistent with both the letter and the spirit of the Constitution. The Constitution guarantees equal protection under the law. Arbitrary and intentional discrimination on

the basis of age violates the Equal Protection Clause. *Gregory v. Ashcroft*, 501 U.S. at 470-71, 111 S. Ct. 2395. *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

John Humenansky, Plaintiff in the subject litigation, and party in the United States of America Petition for Writ of Certiorari, offers this respondent's brief in support of the subject petition. Humenansky confirms his support of the petition and request that the matter be placed on hold until it has been reviewed in *United States v Florida Board of Regents* and *Kimel v. Florida Board of Regents*.

On January 25, 1999, this Court granted review in *United States v. Florida Board of Regents*, No. 98-796, and *Kimel v. Florida Board of Regents*, No. 98-791. The questions concerning the ADEA's abrogation of Eleventh Amendment immunity raised by the United States' petition are identical to those presented in No. 98-796 and No. 98-791. Accordingly, John Humenansky supports the United States and its position that this petition should be held pending the Court's decision in those consolidated cases.

This petition should be granted, as was the earlier petition, because identical questions concerning the ADEA's abrogation of Eleventh Amendment immunity have been raised in a growing number of circuits. The protections afforded by the ADEA to state employees affect hundreds of thousands of employees throughout the country. Various circuits have issued directly conflicting decisions on whether the ADEA abrogates the State's Eleventh Amendment immunity from suit in federal court.

Decisions in the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits, are all in conflict with the Eighth Circuit. The five circuits have upheld the ADEA as proper § 5 legislation. See *Migneault v. Peck*, No. 97-2099, 1998 WL 741545, at **3-7 (10th Cir. Oct. 23, 1998)(citing *Hurd*, 109

F.3d at 1546); *Coger v. Board of Regents*, 154 F.3d 296, 301-302 (6th Cir. 1998);*Keeton v. University of Nev. Sys.*, 150 F.3d 1055, 1057 (9th Cir. 1998); *Scott v. University of Miss.*, 148 F.3d 493, 500 (5th Cir. 1998); and *Goshtasby v. Board of Trustees*, 141 F.3d 761, 765-766 (7th Cir. 1998).

At this time five circuits have ruled in favor of the validity of the ADEA as applied to State employees, while two (including *Humenansky* in the Eighth Circuit) concluded that the ADEA failed to abrogate the States' Eleventh Amendment immunity. The questions presented are of broad importance and currently have left employees in different circuits with different sets of protections.

CONCLUSION

The United States petition for writ of certiorari should be held pending this Court's decision in *United States v. Florida Board of Regents*, No. 98-796, and *Kimel v. Florida Board of Regents*, No. 98-791, and disposed of in accordance with the decision in those cases. John Humenansky, a named party to this litigation, expressly supports the United States petition.

Respectfully submitted.

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Supreme Court, U.S.
FILED
MAR 26 1999
CLERK

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

THE AGE DISCRIMINATION IN EMPLOYMENT ACT DOES NOT ABROGATE THE STATES' SOVEREIGN IMMUNITY

The court of appeals properly concluded that the Eleventh Amendment bars federal court jurisdiction over unconsenting states in private actions under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* The court held that the ADEA does not satisfy either prong of the stringent two-part test for abrogation reiterated by this Court in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996). First, the ADEA does not "unequivocally express[ ]" Congressional intent to abrogate the States' immunity; and second, the statute was not passed "pursuant to a valid exercise of power," specifically, Section 5 of the Fourteenth Amendment. Petitioner's App. 2a-13a; *see Seminole Tribe*, 517 U.S. at 55, 116 S. Ct. at 1123 (citations and internal quotations omitted). The court of appeals' decision fully accords with Supreme Court precedent.

That the ADEA does not explicitly abrogate States' sovereign immunity follows directly from this Court's decision in *Employees of the Department of Public Health & Welfare v. Missouri*, 411 U.S. 279, 93 S. Ct. 1614 (1973). In *Employees*, this Court held that the Fair Labor Standards Act (FLSA), as then written, was insufficient to express a Congressional intent to abrogate. *Id.* at 285, 93 S. Ct. at 1618. Congress in 1966 had amended the FLSA to include States as "employers," but had left untouched the jurisdictional provision – 29 U.S.C. § 216(b) – that simply authorized suit in "any court of competent jurisdiction." This Court reasoned that it would be "surprising . . . to infer" that Congress deprived the States of their constitutional immunity without changing the jurisdictional provision. *Id.* at 285, 93 S. Ct. at 1618.

The ADEA's provisions are virtually identical to the FLSA provisions found insufficient in *Employees*, with a

definition of "employer" that includes States, 29 U.S.C. § 630(b)(1), and a jurisdictional provision that authorizes suit in "any court of competent jurisdiction." *Id.* at § 626(c)(1). The case for abrogation under the ADEA is even weaker given that Congress chose not to amend the ADEA's jurisdictional provision precisely when amended the FLSA's jurisdictional provision in response to *Employees*. *See* Petitioner's App. 4a-5a. The court of appeals reasoned that there could be only two rational explanations for Congress's action: "no intent to abrogate for the ADEA, or legislative oversight, which is not a proper basis for finding 'unmistakably clear' intent to abrogate in the statute's text." *Id.* at 6a (citation omitted).

The court of appeals appropriately rejected the argument that Congress expressed a clear intent to abrogate by incorporation into the ADEA of the "powers, remedies, and procedures" provided in section 216(b) of the FLSA. *See* 29 U.S.C. § 626(b). Section 626(b) does not state that the FLSA's jurisdictional provision is incorporated into the ADEA. Moreover, section 626(b) refers not just to section 216(b), but also to section 626(c), the ADEA's jurisdictional provision, suggesting that Congress intended ADEA jurisdiction to be governed by section 626(c), not the FLSA. In addition, it is not unmistakably clear that the incorporated "powers, remedies, and procedures" from the FLSA refer to federal court jurisdiction, rather than to such things as the right to bring a lawsuit, the right to a jury trial, the right to equitable and legal relief, and other nonjurisdictional provisions. While one might infer that Congress intended the FLSA jurisdictional provision to control under the ADEA, that inference is not the most reasonable one given the statutory language; in any event, a mere inference does not meet the standard of certainty required by this Court. *Dellmuth v. Muth*, 491 U.S. 223, 232, 109 S. Ct. 2397, 2402 (1989).

Even with incorporation of part of the FLSA, Congress could have made its intent clear by directly

addressing immunity within the ADEA itself. Comparison with the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, is instructive. Just as the ADEA incorporates the "powers, remedies, and procedures" of the FLSA, the ADA incorporates the "powers, remedies, and procedures" of Title VII. *See* 42 U.S.C. § 12117(a). At the time the ADA was enacted in 1990, the Supreme Court already had held that Title VII abrogates Eleventh Amendment immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S. Ct. 2666, 2671 (1976). If mere incorporation of a "powers, remedies, and procedures" provision was sufficient to abrogate immunity, Congress would not have abrogated immunity within the ADA itself. Congress, however, did expressly abrogate Eleventh Amendment immunity within the text of the ADA. 42 U.S.C. § 12202. Congress's failure to do the same thing in the ADEA suggests that it did not intend to abrogate States' immunity.

The court of appeals also appropriately held that Congress lacked authority under Section 5 of the Fourteenth Amendment to extend the ADEA to the States, regardless of whether the abrogation of immunity was explicit. In *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), this Court emphasized that Congress does not have the authority under Section 5 to determine the substance of the Fourteenth Amendment's rights; rather, Congress's power is limited to enforcing those rights as defined by the courts. 117 S. Ct. at 2164. While Congress can act under Section 5 to redress or deter unconstitutional discrimination under the Equal Protection Clause, Congress cannot decide that "rational" (*i.e.*, constitutional) state action is in fact "arbitrary" or "invidious" (*i.e.*, unconstitutional) discrimination.

This Court has held that age-based classifications are subject to the most deferential review under the Equal Protection Clause. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 96 S. Ct. 2562, 2567 (1976). Applying the rational-basis standard, this Court repeatedly has

upheld mandatory retirement laws, which in essence use age as a proxy for ability in a job, as rational and therefore constitutional under the Equal Protection Clause. *Id.* at 314-16, 96 S. Ct. at 2567-68; *Vance v. Bradley*, 440 U.S. 93, 112, 99 S. Ct. 939, 950 (1979); *Gregory v. Ashcroft*, 501 U.S. 452, 473, 111 S. Ct. 2395, 2408 (1991). This Court has ruled that the Constitution does not require employers to use individualized testing to determine ability, nor does it require states to justify their decision to use age instead. *Murgia*, 427 U.S. at 316, 96 S. Ct. at 2568. Even if an age-based system is "imperfect" and not "wise," and even if the state could devise a " 'more just and humane system,' " such a system still is constitutional under the Equal Protection Clause. *Id.* at 316-17, 96 S. Ct. at 2568-69 (citations omitted). Thus, while Congress can act under the Commerce Clause to eliminate age-based employment classifications it considers unsound, unjustified, or economically unwise, *see E.E.O.C. v. Wyoming*, 460 U.S. 226, 243, 103 S. Ct. 1054, 1064 (1983), Congress cannot declare those classifications unconstitutional under the Equal Protection Clause.

The ADEA encompasses within its scope exactly the type of constitutional age-based classifications at issue in *Murgia*, *Vance*, and *Gregory*. The ADEA does not redress irrational discrimination; rather, it changes the standard for determining what is rational. Moreover, the ADEA does not deter more broadly arbitrary age discrimination; rather, it prohibits constitutional conduct regardless of whether that conduct ultimately leads to irrational, unconstitutional discrimination. The same kind of flaws in the Religious Freedom Restoration Act led to this Court's decision invalidating the statute in *City of Boerne*. *See* 117 S. Ct. at 2171 (observing that "[l]aws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise"). The court of appeals correctly concluded that Congress lacked authority to abrogate the States' immunity under the ADEA.

CONCLUSION

Given the similarity of questions presented here and those presented in cases in which this Court has granted review, *see United States v. Florida Board of Regents*, No. 98-796, and *Kimel v. Florida Board of Regents*, No. 98-791, Respondent does not disagree with Petitioner's suggestion that this Court hold the petition in this case until those cases are decided. For the reasons articulated by the court of appeals and those highlighted in this brief in opposition, however, Respondent respectfully urges the Court to uphold the decision that the ADEA does not abrogate the States' sovereign immunity.

Respectfully submitted.

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March, 1999